C & R Coal Company *and* Ricky C. Hurt. Case 5-CA-14294

February 25, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND HUNTER

On November 22, 1982, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, C & R Coal Company, Tazewell, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] While we agree that Respondent did not rebut the General Counsel's *prima facie* case as required under the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), we find it unnecessary to rely on the distinction that the Administrative Law Judge drew between a false defense and one which "rises to the level of pretext."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten employees that we will refuse to consider them for employment or to hire them because they engage in activities on behalf of United Mine Workers of America, Local 6183, or in other protected concerted activities for the purposes of mutual aid and protection.

WE WILL NOT refuse to employ or to consider for employment an applicant for employment because he engaged in activities on behalf of the Union or any other labor organization or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Ricky C. Hurt employment as a coal miner and make him whole for any losses he may have suffered as reason of our unlawful refusal to employ him commencing March 29, 1982, with interest.

WE WILL expunge from our records any reference to our failure to hire Ricky C. Hurt on March 29, 1982, or thereafter, and notify him, in writing, that this has been done and that it will not be used as a basis for future personnel actions against him.

C & R COAL COMPANY

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Upon a charge filed on April 27, 1982, by Ricky C. Hurt, an individual, the Charging Party herein, and served on Respondent on May 26, 1982, a complaint was issued by the Regional Director for Region 5, National Labor Relations Board, on June 10, 1982, alleging that C & R Coal Company, Respondent herein, engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. In particular, the Regional Director, on behalf of the General Counsel, alleges that Respondent violated the Act, on or about March 29, 1982, by threatening an applicant for employment that he would not be employed because of his membership in and activities on behalf of Local No. 6183, United Mineworkers of America, herein called the Union; and on or about March 29, 1982, by refusing to hire the Charging Party herein, Ricky C. Hurt, because he engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, thereby discouraging employees from engaging in such activities or other concerted activities for the purpose of collective bargaining. Respondent filed a timely answer to the complaint wherein it admitted various allegations therein but denied the commission of any unfair labor practices or violations of the Act.

A hearing on the issues was held in Tazewell, Virginia, on September 1, 1982, at which counsel for the parties were given full opportunity to participate, examine, and cross-examine witnesses, present other evidence and

make final argument. At the conclusion of receipt of the evidence, the General Counsel argued extensively on the record and Respondent waived such argument. Thereafter, post-trial briefs were submitted on behalf of Respondent and the General Counsel. Based upon the entire record, including the briefs which have been given due consideration, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all material times C & R Coal Company, Respondent, a West Virginia corporation with an office and place of business in Tazewell County, Virginia, has been engaged at that place in the mining and production of coal. During the 12-month period preceding issuance of complaint, a representative period of Respondent's business, Respondent derived gross revenues in excess of $50,000 from the shipment of its coal directly to points located outside the Commonwealth of Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that United Mineworkers of America, Local 6183, herein called the Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

C & R Coal Company, the Respondent, commenced operation of a coal mine in Abbs Valley, Virginia, around March 1, 1982. Its part owner, president and chief operating officer (with 25 years experience in the coal mining busines) was Mack Lester, who Respondent admits is a supervisor within the meaning of Section 2(11) of the Act and Respondent's agent. Prior to that time, Lester was part owner, chief supervisor, and secretary-treasurer of the Kennedy Coal Company which operated a mine in Oakwood, Virginia, some 50 miles away from the C & R mine. At Kennedy Coal Company, Lester was in charge of 10 to 18 miners. The Kennedy Coal Company mine closed down around February 1982 and the 15 to 18 miners then employed at Kennedy were hired, over a period of time, by Respondent. Lester did all of Respondent's hiring. The C & R mine, on or about March 1, 1982, started with one day shift of miners, about seven or eight persons, all of whom were Kennedy employees. By the middle of March, a night shift was added but was eliminated at the end of March when seven to eight employees (many of whom were on the night shift) quit their jobs because they resided at such a distance from the Abbs Valley mine as to make their daily commuting of 40 to 50 miles too onerous. These employees, according to Lester, quit without prior notice to him or to Respondent.

The second shift which ended in late March was a shift devoted to the production of coal. Thereafter, in the beginning of May, Respondent inaugurated a further night shift of three to four employees who, however, were devoted only to maintenance work, preparing the mine and conveyor belt for the use of production workers on the morning shift. Lester testified without contradiction that he hired the former Kennedy miners because he knew of their work and did not have to interview them. At the opening of Respondent's mine, Lester maintained a pad of yellow paper (G.C. Exh. 2) on which he recorded the names of applicants for employment who visited him at the mine.

Lester testified that at the end of March, with seven to eight employees quitting without notice, there were seven to eight vacancies which suddenly opened up. The vacancies included hole drillers, shot firemen (explosivemen), scoop operators, and belt line operators. The C & R mine operated with Mack Lester performing mostly nonmine adminstrative work outside the mine, with the miners working under a foreman over the inside mining operations. In addition to the miners, Mack Lester's brother, Floyd Lester, worked as an all-around employee inside the mine, not subject to the foreman's orders, but nevertheless not performing as a supervisor.

Respondent's former Kennedy Coal Company employees were not members of the United Mineworkers Union or any other labor organization when Lester hired them in March 1982. However, because C & R Coal Company was a contractor supplying coal to the Consolidation Coal Company, a UMW contract signatory, and because Consolidation Coal Company insisted that its contractors sign and abide by the industrywide UMW collective-bargaining agreement (the Bituminous Coal Wage Agreement of 1981), by April 1982, within a month of opening the mine, Lester notified all of C & R miners that they were obliged to join the Union and that if they did not do so he could no longer keep them. Thereafter, Respondent's miners joined the Union and Respondent remitted the periodic checkoff dues to the Union (Resp. Exh. 1).

B. *Hurt's Experience and Prior Employment*

Ricky C. Hurt, unemployed since November 1981, when he was laid off from the White Diamond mine in West Virginia, is an experienced coal scoop operator and was certified by the State of West Virginia in November 1981 as a "shot fireman" having worked as a shot fireman since 1980. A shot fireman prepares and ignites the explosives used to shatter the coal seam which is being mined. He also testified that he had 2 years overall (but not full time) experience as a mine "roof bolter." The owner-operator of the West Virginia White Diamond mine, Walter Keen, had employed eight miners in that operation, all of whom were members of Local 6183 of the United Mineworkers of America, the Union herein.

Hurt testified, and Walter Keen did not deny, that Hurt filed a grievance in or about August 25, 1981, regarding Keen's failure, under the UMW contract, at White Diamond to pay Hurt triple time the regular rate of pay for Hurt having worked on his birthday. After

Keen failed on three occasions to pay Hurt for this birthday work (and I credit Keen that he failed to do so because of a lack of funds notwithstanding his desire to do so) Hurt filed a formal grievance after which the money was paid. On the three occasions that Hurt requested the money, Keen told him that he was lucky to have a job and, indeed, it was lucky for any of them, including Keen, to have a job because of depressed business. After Hurt filed the grievance, Keen told him that he should not have done so, should not have gone to the Union with the problem, but should have consulted Keen and worked out the problem.

Similarly, Keen failed to pay Hurt for the 3 days that Hurt failed to work after Hurt's grandfather died. Pursuant to the UMW contract, Hurt was allowed the 3 days off *with pay*. Ultimately Keen told him that if he had the money he would pay and, after a period of weeks, and Keen's "mean hateful looks," Keen did pay this bereavement pay to Hurt.

Further, Hurt asserts, but Keen denies, that Keen refused to properly pay overtime at time-and-one-half the regular rate required by the contract. Actually Keen permitted employees time off with pay rather than pay the regular rate and that such an understanding precluded the employees from complaining of not having been paid the time-and-one-half rate. Hurt admitted that the employees decided to forgo their rights to the time-and-one-half rate of pay. There is no proof that Keen was aware that Hurt led or participated in any protest regarding failure to pay the overtime rates.

When White Diamond was closed in November 1981, at least three employees were not paid accrued vacation and "personal" days, under the collective-bargaining agreement, accumulated in the year of their employment. Although Keen denied knowledge (I do not credit his denial) that the Union, on behalf of at least three employees, filed a mechanic's lien against White Diamond and the contractor for whom it supplied coal (Pocahontas Coal Company), there is no question that Pocahontas paid off the lien, paid Hurt around $800, and each of the other two employees around $500 before the lien was raised.

C. *The Hurt-Lester Conversation*

In January 1982 Hurt learned that Mack Lester might be opening up a new mine and telephoned him, asking for work. Lester told him that there were no openings at that time. Hurt requested that he keep him in mind and told Lester that he would call again.

The remainder of the Hurt-Lester conversations relating to Hurt's request for employment is in substantial dispute, with Hurt testifying with great particularity and Lester testifying as to lack of substantial recollection of the dates and substance of the conversations. In any event, I credit Hurt's testimony in that on Friday, March 26, 1982, at or about 9 a.m., Hurt visited Lester at the mine. Hurt told Lester that he heard that Lester might be needing men and Lester said "maybe." Hurt said that he heard that a shift of men had quit and Lester said that "maybe they did." Hurt then asked what kind of men he was looking for and Lester said he was looking for scoop operators, bolters, and shot fireman. Hurt told him that he had some scoop experience as well as bolting experience and was certified in West Viginia (through Walter Keen at the White Diamond mine) as a shot fireman. Hurt further said that if Lester needed a shot fireman, Hurt (who was licensed only in West Virginia) would get Virginia papers. I credit Hurt's testimony that Lester said that such a procedure would not be necessary and I discredit Lester's denial of such a conversation.

When Lester asked Hurt whether Walter Keen would give a good reference, Hurt told him that he had an unsatisfied lien against Keen and Keen's mining machinery and that Keen might hold something against Hurt. Lester said that he knew Keen well and that Keen was not that type of person. When Hurt expressed doubt that Keen would give him a good reference, Lester told him that, if Keen confirmed a good Hurt work record, he would put him to work. Notwithstanding that Hurt inferred that the circumstances showed Respondent's need to immediately replace seven to eight employees, and that Lester meant to put him to work on Monday, March 29, Hurt admitted that Lester did not disclose any particular day to start work. Lester told Hurt that he would check out his references and that Hurt should check back with him on the following Monday (March 29, 1982). Hurt testified, and there was no dispute, that Hurt did not mention any of his other problems with Keen and the White Diamond mine other than the mechanic's lien.

On the following Monday, March 29, 1982, between 9 and 10 a.m., Hurt checked back with Lester at the mine, pursuant to their March 26 agreement. Hurt asked Lester if he had spoken to Keen and Lester said that he had not but that they should try to call Keen. They entered Lester's office; Lester found the phone number and dialed Keen's home.[1] He thereafter was connected to Keen after identifying himself and said that he was calling to inquire about Hurt, Keen's former employee. Hurt testified that Lester, with the phone in his hand, apparently repeating what he was hearing from Keen over the phone, said: "good scoop operator, good worker" and then, following a pause of what appeared to be 2 minutes, "a union radical." Keen and Lester then discussed another miner, Samuel Murray, and Lester wrote Murray's name and phone number on a piece of paper. Lester then told Keen that that was all he was calling about, that they would speak later and then Lester hung up.[2]

After a few moments of silence, Lester said Hurt: "I was going to give you a chance." Lester then said that, although Keen had given Hurt a good work record, Keen had called him a "union radical" and that Lester

[1] Lester testified that he knew Walter Keen about 15 years but was not particularly friendly in a social sense. Although Keen testified and did not mention any socializing, he appeared to suggest a much warmer and closer relationship between the two of them. Keen testified that prior to his being called as a witness by the General Counsel, he nevertheless reviewed his testimony with Respondent and, on the day he gave testimony, had lunch with Lester and Respondent's counsel.

[2] Lester did not specifically deny that Hurt was present at his phone conversation with Keen but said he never checked references in the presence of any applicant. I have not credited this testimony for reasons appearing hereafter. I find that Hurt was present during the reference check, especially since Lester had no recollection either way.

could not "take that chance." According to Hurt's credited testimony, Lester then said that he did not want any "troublemakers."[3] Lester denied that Keen mentioned the Union or Hurt as a "troublemaker."

Hurt told Lester that he was not a troublemaker and he would appreciate a chance to show him that he was not. Lester said that he was sorry but he could not take a chance on Hurt and then asked Hurt if he knew Samuel Murray. When Hurt said that he did, Lester asked what kind of worker he was. Hurt told him that, although Murray misses work from time-to-time, he was "OK." Hurt asked Lester to reconsider his refusal but Lester said that he could not.

On Wednesday, March 31, Hurt again visited Lester at the mine, asked him to reconsider; Lester refused and, pursuant to Hurt's question, admitted giving Murray a job and also admitted that Keen had given Hurt a good work reference. Hurt left after saying that if Lester reconsidered his decision he should give him a call.

In April 1982 at the mine, Hurt again visited Lester, asked him if he had reconsidered; Lester said that he had not; and Lester told Hurt that he just hired a young man who had given a prior employer trouble but had not given Lester any trouble. Lester said that he hired him anyway. Lester did not deny this April conversation.

D. *Lester's Version of the Failure To Hire Hurt*

Lester could not recall whether Hurt had visited him before the end of March 1982 to inquire about employment or whether he spoke to Hurt before or after the quit of the seven or eight employees in late March 1982. Although Lester admits that Hurt was at the mine on more than one occasion looking for work, he recalled only that Hurt was there before May 26, 1982, when the unfair labor practice charge relating to Lester's refusing to hire Hurt was served on Lester.

Lester could not remember when Hurt first visited him or the circumstances surrounding the visit except that Hurt asked for work and that Lester, according to custom and practice in dealing with applicants, told him that there was nothing then available but that he would record the fact of the request for employment together with the employee's qualifications and references and then, if there was an opening, he would contact the applicant. In particular, Hurt testified that he could not recall telling Hurt that he *would* hire him if things "checked out." Lester testified credibly that he keeps on hand a pool of names of applicants, with checked-out references, so that he can hire employees with dispatch in case of an opening. As above noted, Lester could not deny that Hurt was present when he telephoned Keen for a reference check.

Lester testified particularly that he never told Hurt to return but that, on Hurt's second appearance at the mine, Lester drank a cup of coffee while telling Hurt that as soon as something became available, he would call him, but that there was no job available at that time. Lester further testified that the late March quit of seven to eight employees was filled only with old Kennedy Coal mine employees who were then out of work. He further testified that with regard to the names of applicants he keeps on his yellow pad (G.C. Exh. 2), he always checks them out and hires them in the order on which they appear on the pad.

The testimony showed, however, that Lester approximated the number of Kennedy Coal Company miners as approximately 200; and, in addition, that Samuel Murray, a miner whom he hired on March 31, 1982, was not a former Kennedy Coal employee. It was not satisfactorily explained why no Kennedy employees were available on or about March 31 for hire since he gave them hiring preference and why their names were not known to Lester.

With regard to his contacting Walter Keen concerning a reference check on Hurt, and notwithstanding that, at first, Lester testified that he did not know where Hurt said he had worked (G.C. Exh. 2, Lester's own record, showed that Hurt, according to Lester, said that he had previously worked for Walter Keen), his record showed that he had indeed checked with Keen on Hurt's references and that Keen had given Hurt a good reference. As in other testimony, Lester could not recall whether, when he spoke to Keen concerning Hurt, he spoke of Samuel Murray's quality of work in the same conversation. Although he admits he telephoned Keen, he could recall only so much of the conversation wherein Keen told him that Hurt was a "pretty good man if you keep up with him" (i.e., if you supervise him closely); but that "if you stub your toe, he would be the first one to complain." This enigmatic Keen statement which Lester said he did not understand and for which Lester asked no further explanation was never explained by Keen. Similarly, Keen, in substance, said that he made this enigmatic statement to Lester but never explained what it meant or was asked by Lester to explain it. In any event, Lester particularly recalled that Keen said nothing regarding the Union or any grievances against White Diamond or Keen.

Lester admitted that Keen had given Hurt good references, that Hurt had good skills but said that these skills were not needed by Respondent at that time. In particular, Lester testified that he did not hire Hurt because when Hurt applied there were no openings; that when there were openings, applicants on his list, ahead of Hurt, were hired; that he never jumped the list to hire a person out of order. He said that he never reached Hurt's name on the list. In particular, he testified, and the evidence showed that, applicants on his list, ahead of Hurt, were hired; that he never jumped the list to hire

[3] Regarding G.C. Exh. 2, in evidence, and the fact that Lester had noted thereon Walter Keen's good recommendation of Hurt as a miner, the General Counsel argued that, this late in the enforcement of the National Labor Relations Act, sophisticated employers could not be expected to execute written documents which would demonstrate a clear departure from the truth, thus making inculpatory statements in writing. The General Counsel, at the same time, argues, supporting Hurt's testimony, that Mack Lester would admit to an employee whom he was about to reject for employment, that the employee was being rejected because a prior employer called him a "union radical" thus making Hurt a "troublemaker." Such a position seems to me to be inconsistent. I have nevertheless credited Hurt for reasons appearing below, including Hurt's direct, unconditional, specific, and sure testimony compared to Lester's repeated lack of recollection of particular conversations but also, especially, as hereinafter noted, the overall lack of credibility in the testimony of Walter Keen.

persons out of order. He said that he never reached Hurt's name on the list. In particular, he testified, and the evidence showed that, according to names on the list, no name on that yellow legal pad appearing after Hurt's name was hired or appeared in the payroll. On the other hand, there is no doubt that Respondent's interview—hiring "file" (G.C. Exh. 2), to say the least, is a primitive document: pages are torn out completely; some pages are torn in half; and there is no question but that, replete with "doodles" written on some of the pages, the document, though apparently kept in the regular course of business, does not appear to be a document which reliably describes the full hiring process. Whether the pages which are fully or partially torn out represent the names of other employees, or applicants, including Hurt, which might have appeared prior to the time that Hurt's name appears on its page 20 (G.C. Exh. 2) is a matter of speculation. I note again, in particular, that Lester testified that, while his usual practice is not to have the applicant present at the time that he [telephones] checks the applicant's work references, Lester could not deny that Hurt might have been present when he telephoned Keen. This Lester testimony was elicited to negative Hurt's particularized testimony demonstrating that he *was* present at the time that Lester telephoned Keen regarding Hurt's work record. Observing Lester as he testified, I was not at all impressed with this type of negation. It appeared to me at the time, and review of the transcript further demonstrates, that Lester had no absolute recollection that Hurt was not present at the time that he telephoned Keen (just as he was unsure whether this Keen telephone conversation regarding Hurt also included a reference to Samuel Murray), and that Lester was attempting to take refuge in his "normal" business practice rather than expressly negativing Hurt's presence at the conversation. In addition, no reason appears why Lester might have deviated from his normal practice thus permitting the conclusion that Hurt's testimony was truthful. On this record, I credit Hurt over Keen and Lester.

Respondent's Records

In support of its defense that Respondent's failure to hire Hurt was based on the lack of an existing job for him; that Hurt would have been hired had there been an opening; but that in the order of preference, as expressed in its yellow legal pad (G.C. Exh. 2), by the time Hurt's name was reached, other names had been chosen from the pad and given preference in hiring thus eliminating any job opening for Hurt, Respondent produced other records demonstrating that employees appearing on General Counsel's Exhibit 2 on the list before Hurt were hired before Hurt. In fact, none of these employees were produced by Respondent to support its defense. What Respondent did produce was its payroll records showing not the date of the *agreement to hire* the particular employees (in particular, Samuel Murray, Don Basham, and Howard Mitchell), but records showing the date that they first appeared on Respondent's payroll. In the case of Samuel Murray, it appeared that he first reported for work on March 31, 1982; in the case of Basham and Mitchell, they reported for work on April 2, 1982. In order to support the fact that these employees who commenced work in jobs after Hurt may have appeared for employment (as early as March 26), were hired before Hurt appeared, Respondent, through Mack Lester, testified that, although these were the actual dates on which these employees entered on duty, the agreements to hire them preceded the appearance of Hurt. In short, Respondent's records were insufficient to show that these employees were "hired" before Hurt; all they show is that they *entered on duty* before Hurt.

In order to bolster this crucial timing factor—that their being hired was not inconsistent with the appearance of their names on Respondent's employee-applicant list (G.C. Exh. 2) prior to the appearance of Hurt's name—Lester testified that there had been an agreement to hire Murrary, Basham, and Mitchell prior to Hurt's appearance. Thus, Lester explained that Basham and Mitchell, in particular, were *hired* before Hurt's initial appearance and that they did not enter on duty because he permitted them to receive certain union benefits which would accrue to them if they did not enter on duty immediately on the date of hire. Again, neither Murray nor Mitchell nor Basham was produced[4] to support the existence of an agreement to hire them sometime prior to their entering on duty notwithstanding that, as the General Counsel points out, the quit, without prior notice, of seven to eight Respondent employees (i.e., about 50 percent of Respondent's work force) required the immediate replacement of the quit employees.[5]

The Testimony of Walter Keen

As part of the General Counsel's case, the General Counsel called Keen as its witness. It appeared, at once, that the General Counsel regarded Keen as an adverse witness. Keen testified that he knew Hurt when Hurt was employed by a subcontractor (Black Mountain Coal Company) on the same property where, thereafter, Keen, as the owner-operator of White Diamond Coal Company, had Hurt working directly for him. He admitted failing to properly pay Hurt the triple- time mandated by the collective-bargaining agreement for *birthday* work but, as with other failures to pay Hurt and other employees at White Diamond, Keen credibly testified of the economic difficulties in operating White Diamond. He testified that, although he told Hurt and others that he was doing his best to pay them, Hurt was not satisfied and took an unreasonable attitude with regard to his contractual claims for money. Thus, Hurt filed a grievance

[4] Regardless of whether these three employees were "equally available" to the General Counsel, they were necessary to corroborate Respondent's defense. Cf. *Hitchiner Manufacturing Co.*, 243 NLRB 927 (1978).

[5] To the extent that Respondent called John L. Toney a "head maintenance man" to support Respondent's testimony concerning Lester's use of the yellow pad to record the rigid sequence of applicants for employment and never permitting applicants to be present when the reference check is made; and notwithstanding that he was present on some six occasions when Lester made reference checks outside the presence of the applicant, Toney was not present when the Hurt reference check was made to Walter Keen. Toney's testimony was admittedly biased in favor of supporting Respondent and his testimony with regard to the substance of the case (whether any applicants who were not on the list were hired) was so patently mistaken that I am unable to credit his testimony.

with regard to birthday pay and thereafter a charge with the Labor Board concerning other matters. He also admitted having difficulties paying Hurt for the bereavement benefit due to Hurt's grandfather's death but, denying direct knowledge of the existence of a mechanic's lien, admitted paying Hurt and other employees moneys to satisfy their claims for having not been paid for personal days and accumulated personal time occasioned by the White Mountain mine shutdown in November 1981.

With regard to Mack Lester contacting him concerning Hurt's work record, Keen testified that he remembered the occasion but could not remember when it occurred, remembering only that he told Lester that if he would "stay with Hurt, he would be OK." He said that he knew of the claims of employees, including Hurt, against him but did not regard Hurt as a ringleader but only "one of the boys." Notwithstanding such testimony, he admitted that Hurt was the only employee who complained of bereavement pay and triple time pay not being paid.

On the other hand, Keen directly contradicted Lester's testimony that Lester does not go into the mine to supervise employees; Keen testified that Mack Lester, and his brother Floyd Lester, do not operate a mine where they do not know what is going on in the mine. Rather, Keen said that Lester regularly goes down into the mine to supervise employees and know the particular jobs for which each employee is fitted. In addition, I was not satisfied with the reliability of Keen's overall testimony on other aspects: (1) it was clear that Keen changed his testimony on the material question whether a Board agent mentioned an unfair labor practice charge that Hurt had filed against Keen for attempting to blackball Hurt from employment, the change of testimony being that Keen never heard of such a charge but then admitting that, although he never saw the charge, the Board agent taking his statement in the instant case did mention the existence of the other charge; (2) although he described Hurt's action against him in filing grievances as "harassment," he denied using such a term and then testified that if he had used it, it was a mere slip and mistake; (3) he denied having received notice of the Board charge filed against him by Hurt for blackballing him; but he admitted that his wife signed a green return-receipt slip for receipt of the registered mail containing the charge but denied ever having seen it. I do not credit such testimony; (4) as above noted, he testified to a much closer friendship with Lester, including lunch with him and Respondent's counsel during the hearing; (5) his failure to recollect the circumstances surrounding, and the date of or the sequence of the telephone conversation with Lester regarding Hurt's work record is conspicuous only to the extent that he could remember particularly the same elements which Lester remembered; (6) and lastly, notwithstanding that he regarded Hurt as only "one of the boys," he did not deny that Hurt was the only one who had filed charges against him, was the only employee who filed a grievance over bereavement pay and birthday pay, and was the largest payee of moneys paid by Pocahontas Coal Company to satisfy the mechanic's lien filed against White Mountain Coal Company and Pocahontas.

To the extent that Keen sought or may have sought to corroborate Lester's testimony with regard to the phone conversation, I do not credit it because of the above, adverse credibility resolutions including my belief that Keen bore Hurt more animus regarding Hurt's protected concerted activities than he admitted. While it does not follow that because Keen was an incredible witness, his failure to corroborate Lester makes Lester an incredible witness, I believe that Keen's particular lack of credibility tends to reflect adversely on Lester's credibility including the specifics of the phone conversation between Lester and Keen.

The Credibility of Mack Lester

While the General Counsel makes much of Mack Lester switching testimony regarding Respondent's alleged inconsistent defenses: was Hurt not hired because (a) his name was never reached or (b) when his name was reached there was no job available for him, the two "defenses" are arguably consistent and actually part of the same economic defense theory. What the General Counsel does show (Br., p. 4), however, is an irreconcilable Mack Lester self-contradiction on the main support of Respondent's defense—that it hired only sequentially, as the sequence of applicants appeared in its applicant record (G.C. Exh. 2). Hurt's name appears on page 20. "Smokey" Mitchell appears first on page 21. Lester never contacted Hurt for employment though Lester admitted that Hurt's skills qualified him. Lester testified that he called "Smokey" Mitchell (not Howard Mitchell) and "told him that I had an opening for him if he wanted to come to work." Although he never did work for Respondent, there is no reason why he was called out of sequence and no reason why he was called rather than Hurt, who, according to Respondent, was a prior applicant.

As the General Counsel also observes, it is further destructive of Lester's credibility that, a few minutes after giving the testimony quoted above, he testified that what he told Smokey Mitchell was that "we don't have any jobs available at this time."

I have already noted that, with regard to credibility, Lester's testimony was also manifested by a consistent lack of recollection concerning the substance and sequence of many crucial events, particularly whether, in fact, Hurt was present when Lester spoke with Keen on the telephone. Lester also could not remember whether, in his conversation with Keen, applicant Murray's qualifications were mentioned at the same time as Hurt's. I have also noted what I regard as the failure to support Respondent's defense by calling Basham, Mitchell, and Murray regarding the existence of *agreements to hire* rather than merely entry on duty, to show that, consistent with the appearance of their names on the yellow legal pad of applications, they were hired before Hurt's appearance in March 1982. This is particularly important in view of the torn out and "informal" condition of that document upon which Respondent relies as a device to prove the sequence of hirings. And especially is this true where Respondent admitted that there was a difference between the date of the agreements to hire and the entry

on duty of those three employees, all of whom entered on duty after Hurt testified he was inquiring of, and had conversations with, Lester concerning employment in late March. This was in the face of seven to eight openings caused by sudden quits of employees at the same time. Especially in view of Lester's inconsistent testimony regarding the hiring of Smokey Mitchell, I find it incredible in the absence of proof of similar prior hiring patterns, that all three of these employees who entered on duty *after* Hurt applied for employment, were *hired before* Hurt made application.

The Credibility of Ricky C. Hurt

There was no question that Hurt testified with great specificity and without apparent lapses or inconsistencies, as opposed to Lester whose lack of recollection was thorough and consistent. There was no comparison in terms of the hesitant, inconsistent, and apparently biased testimony of Keen. On the other hand, it was clear, based on Hurt's admissions, that he had been out of work for a year and, indeed, on unemployment compensation, since last working for White Mountain Coal Company in November 1981; that he had a wife and child to support and thus had a clear and pressing economic motive; that he was experienced in filing grievances and dealings with the Union and indeed had previously filed a charge with the Labor Board concerning Keen blackballing him, which charge was withdrawn; and, it seemed to me, was experienced in the ways of the Labor Board and thus fully capable (as I mentioned at the hearing) of "sweetening" the apparent conversation between Keen and Lester (of course, Hurt heard not a single word that Keen allegedly said and heard only what Lester allegedly said) by the simple addition of the words "union radical" to a conversation which was otherwise ambiguous—merely a generalized telephone report by Keen to Lester that Hurt was a "cry baby" and was the first employee to complain about some real or imagined working conditions which he did not care for, which would be includable in the phrase "if someone stubs his toe, he is the first to complain." Hurt's motive, experience, and opportunity are clear.

On the other hand, I was impressed with the fact that, absent some Lester explanation, there was no reason, if Lester told Hurt that there was no job available for him on or about March 26, why Hurt would return on March 29 except to implement Lester's promised inquiry into references. This issue was never explored by Respondent nor was there an attempt to refute the particular dates on which Hurt said he was there at the mine with Lester—March 26 and 29. Certainly Respondent never sought to undermine the credibility of Hurt with regard to these dates. I conclude that Hurt was there on those dates and that, consistent with Hurt's testimony, the explanation for his presence on those dates was that Lester, as Hurt testified, said that he would check with Keen on Hurt's references over the weekend and that Hurt appeared on March 29 to determine what the results of the reference check were. It was then that Lester admitted that he had not made the reference check and that the reference check proceeded at that point. Whatever was Lester's usual business practice, and his contacting Smokey Mitchell is inconsistent with the alleged sequential practice, I conclude that in his haste to hire employees to replace the recent quits, and in the face of Hurt's alleged good qualifications, he telephoned Keen in Hurt's presence. Lester's inability to deny this crucial Hurt testimony undermines the alleged unequivocal Lester practice of conducting the reference check outside the applicant's presence. A more difficult question is what Lester actually said to Hurt as an alleged repetition of what Keen was telling him on the telephone. However, once it is concluded, as I have indeed found, that Hurt was truthful and Lester failed to deny dates of Hurt's appearance at the mine mouth (March 26 and March 29) and that Hurt was truthful and Lester again failed to deny that Hurt was present during Lester's phone conversation with Keen, it is reasonable to find, as I do, weighing the possibility, for reasons already advanced, the unemployed Hurt was "sweetening" his testimony by the addition of the words "union radical" to an otherwise ambiguous conversation with Lester, that a preponderance of the credible testimony shows that the words "union radical" were indeed used. I further conclude that Lester, in accordance with Hurt's testimony, told Hurt on March 26 that if Keen gave Hurt a good work record he would *put him to work*; that Hurt's inference concerning when he was to be put to work was correct, notwithstanding that Lester failed to mention a particular date on which he would put Hurt to work; and that day would have been March 29, 1982. It was on that day, March 29, 1982, that Lester indeed checked Hurt's references, and failed to hire Hurt but, at the same time, inquired from Keen of Samuel Murray's references. Murray was hired 2 days later on March 31. Thus I conclude that had Respondent acted unlawfully, it would have hired Hurt on March 29 and only reached the March 31 hiring of Samuel Murray by virtue of its unlawful refusal and failure to hire Hurt.

Discussion and Conclusions

I have credited Hurt in that Lester on March 29, 1982, said he would put Hurt to work if Keen gave him a good reference. The evidence shows that Keen did so but apparently added other remarks regarding Hurt's union activities. In any event, having concluded that a preponderance of the credible evidence shows that Lester, in refusing to hire Hurt on or about March 29, 1982, included and specified in his refusal as one of the reasons therefor, that Hurt was a "union radical" in his prior job, Lester was basing the refusal to hire on an unlawful consideration and was violating Section 8(a)(1) and (3).[6] With such a reason for refusal, I conclude that the General Counsel proved a *prima facie* case of a discriminatory and unlawful refusal to hire an "employee" *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177 (1941), for whom a job was actually in existence, *Atlas Railroad Construction Co.*, 262 NLRB 1206 (1983); *Pfizer, Inc.*, 245

[6] As noted hereafter in discussing the inadequacy of Respondent's defenses, the violation of Sec. 8(a)(3) derives not from job availability, but from the failure to consider Hurt's application for reasons proscribed by the Act. *Alexander Dawson, Inc.*, 228 NLRB 165 (1977); *Apex Ventilating Co., Inc.*, 186 NLRB 534 (1970).

NLRB 52 (1979). In proving that *prima facie* case, the General Counsel thereby supported his obligation pursuant to the test announced by the Board in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1981), to prove that a motivating factor in Respondent's refusal to hire Hurt was discriminatory within the meaning of Section 8(a)(3) of the Act. See *Alexander Dawson, Inc.*, 228 NLRB 165 (1977); *Apex Ventilating Co., Inc.*, 186 NLRB 534 (1970).

Respondent, in its turn, bears the burden of adducing sufficient evidence to persuade the Board that factors wholly apart from those comprising the General Counsel's *prima facie* case support its defense that its failure to hire Hurt was for reasons apart from the protected activities which support the *prima facie* case. *Hillside Bus Corp.*, 262 NLRB 1254 (1983). Thus the question arises whether Respondent adduced sufficient persuasive evidence to rebut the *prima facie* case.

Respondent's defense is essentially that there was no job available for Hurt because, in pursuing Respondent's regular business practice of hiring in accordance with the sequence of applicants as they appear on Respondent's application list (G.C. Exh. 2), it had exhausted the job opportunities by virtue of using the list. I have found, however, Respondent's defense factually unproven because (1) in the case of its merely *contacting* Smokey Mitchell for actual, immediate employment and not contacting and making the offer to the prior applicant, Hurt, it violated—without explanation—its own basic business practice, the keystone of its defense; and (2) it failed to corroborate its defense when it failed to call (or explain its failure) employees appearing later on the payroll than Hurt whom it allegedly *agreed* to hire before Hurt presented himself. With regard to (1), above, Respondent's *contacting* Smokey Mitchell before contacting Hurt makes immaterial the date or dates on which Hurt applied for employment—for as long as Respondent's list of applicants showed that Hurt applied before Smokey Mitchell, since Respondent admits Hurt's acceptable qualifications, then, on Respondent's theory, he should have been contacted before Smokey Mitchell, regardless of the dates testified to by Hurt and regardless whether Smokey Mitchell was actually hired.

These above conclusions dispose of Respondent's two briefed arguments: that Mack Lester did not use the term "union radical" in refusing to hire Hurt, thus eliminating the establishment of a *prima facie* case; and, secondly, even if a *prima facie* was proved, Respondent showed that no one *listed* after Hurt was *hired* .[7] As I found, Respondent's merely contacting Smokey Mitchell and offering him a job out of order, after Hurt applied, was enough to undermine its defenses. Since the second defense was actually false, it supports the *prima facie* case, *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966). Moreover, even if Hurt would not take hiring preference over Samuel Murray, he would surely have been hired ahead of Smokey Mitchell who appeared after Hurt on the list.

[7] To the extent that Respondent asserts (Br., p. 4) that no one listed after Hurt was *offered* employment, it is factually in error: Smokey Mitchell was listed after Hurt and was offered employment.

In this evidentiary posture, it is unnecessary to reach or analyze Respondent's argument (Br., p. 6, *et seq.*) that the courts of appeal disagree on whether *Wright Line, supra*, requires the employer-respondent to merely *produce* evidence to rebut the *prima facie* case or, under the Board rule, to carry a burden of *persuasion, Hillside Bus Corp., supra*. Contrary to Respondent, its defense of sequential hiring was false—not rising to the level of pretext, and it thus failed even to *produce* evidence to support its articulated defense.

Lastly, to the extent Respondent argues (Br., p. 8) that a defense exists here since Respondent refused to hire Hurt because there was no work available at the time of his application, the Board has rejected that defense, holding that the requirement of nondiscriminatory consideration of an applicant does not depend on the availability of a job. That is relevant only to the employer's backpay obligation which is properly left to the compliance stage. *Alexander Dawson, Inc.*, 228 NLRB 165. The 8(a)(3) violation occurs in the failure to consider the application for reasons proscribed by the Act. *Shawnee Industries, Inc.*, 140 NLRB 1451, 1542-53 (1963), enforcement denied on other grounds 353 F.2d 221 (10th Cir. 1964). Final determinations of job availability and possible backpay liability are ordinarily left to compliance. *Apex Ventilating Co., Inc.*, 186 NLRB 534 (1970). Here, however, I found a job available for Hurt on March 29.

By Mack Lester telling Hurt that he was not considered because he was a "union radical," Respondent independently violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent C & R Coal Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by telling Hurt that it was not hiring Ricky C. Hurt as its employee because of his being a "union radical."
4. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ Ricky C. Hurt for an available job on March 29, 1982, because of his lawful union and protected activities engaged in during employment with a prior employer, thereby unlawfully discouraging union activities.
5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. I have found that, but for Lester's unlawful discrimination, and his refusal to give Hurt "a chance," Hurt would have been hired, not Samuel Murray, regardless of Murray appearing on the application list before Hurt. In any event, Hurt would have been hired before Smokey Mitchell who appeared *after* Hurt and was offered a job.

Having found that Respondent discriminated against Ricky C. Hurt by failing to employ him for available work on March 29, 1982, I shall recommend to the Board that Respondent be required to offer Hurt employment in any existing job presently using any of the skills (including shot fireman if Hurt is licensed in Virginia) in which Ricky C. Hurt is qualified, discharging, if necessary, any employees hired in his stead commencing on and after March 29, 1982, or, if no such job is available, to a substantially equivalent job if such job exists, discharging if necessary any incumbent therein; and that Respondent be ordered to make Ricky C. Hurt whole for any loss of wages he may have suffered by reason of the discrimination against him. Backpay shall be reduced by any interim earnings and computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[8]

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, C & R Coal Company, Tazewell, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that it is refusing to consider them for employment or to hire them because they engaged in union or other protected concerted activities for the purposes of mutual aid and protection.

(b) Refusing to employ or to consider for employment an applicant for employment because he engaged in activities on behalf of United Mine Workers, Local 6183, or any other labor organization, or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Ricky C. Hurt employment as a coal miner in any of the skills specified in the section of this recommended decision entitled "The Remedy" and make him whole for any losses he may have suffered by reason of its unlawful refusal to employ him commencing March 29, 1982, in the manner set forth therein.

(b) Expunge from its records reference to Respondent's failure to employ him on March 29, 1982, or thereafter, and notify Ricky C. Hurt, in writing, that this has been done and that it will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order and Respondent's compliance with section 2(b) of this recommended Order.

(d) Post at its C & R Coal Company mine in Abbs Valley, Virginia, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."